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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1105

BOBBY L. FORREST AND GERARD E. KIEFER, d/b/a FORREST AND KIEFER, A LEGAL PARTNERSHIP
Petitioners

versus

THE CAPITAL BUILDING & LOAN ASSN.
BATON ROUGE SAVINGS & LOAN ASSN.
HOME SAVINGS & LOAN ASSN.
UNION FEDERAL SAVINGS & LOAN ASSN.
CITIZENS SAVINGS & LOAN ASSN.
GUARANTY FEDERAL SAVINGS & LOAN ASSN.
Respondents

Appeal from the United States Court for the Middle District of Louisiana

ORIGINAL BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. INTRODUCTION

Respondents in opposition to the petition for a writ of certiorari respectfully show that:

1. The decision below is predicated on a stipulation of facts and therefore does not involve a federal question of substance nor any important question of federal law which has not been, but should be, settled by this Court.

2. The decision below has not decided any federal question in conflict with a decision by any Court of Appeals or with any applicable decision of this Court.

3. The matter does not have such a substance as would call for this Court's power of review.

By way of further opposition to the petition for a writ of certiorari, respondents show:

II.

QUESTION PRESENTED

Does the selection by each of the respondent Savings and Loan Associations of its own attorneys to examine titles to immovable property for it, render title opinions to it, and prepare the necessary security agreements, when lending its money, violate Sections 1 and/or 2 of the Sherman Act?

III.

STATEMENT OF CASE

The material facts of this suit are uncomplicated and have been stipulated by the parties, said stipulation being attached to and made a part of the opinion of the Trial Judge. The petitioners, Bobby L. Forrest and Gerard E. Keifer, are residents of the Parish of East Baton Rouge, and practice law as partners, with offices in the City of Baton Rouge, and a substantial portion of their practice involves the handling of real estate matters. (Stipulation No. 1; 385 F. Supp. at 839-40). The respondent associations (hereinafter referred to as the "associations") are four Louisiana savings and loan associations and two federally chartered savings and loan associations, all domiciled in East Baton Rouge Parish.[1] Each

[1] Capital Building & Loan Association, Home Savings & Loan Association, Baton Rouge Savings & Loan Association, Citizens Savings & Loan Association, Guaranty Federal Savings and Loan Association, and Union Federal Savings and Loan Association.

association is a separate corporation, each having its own officers and Board of Directors, elected by its membership. There are no interlocking directors. (Stipulation No. 2; 385 F. Supp. at 840). Each association is a mutual corporation, as opposed to a stock corporation, entrusted with the safe keeping of the funds of its depositors. The associations are engaged in lending large sums of money to commercial and residential property owners in Louisiana, principally in the Baton Rouge area. (Stipulation No. 3; 385 F. Supp. at 840). All loans made by the associations are secured by mortgages upon immovable property situated in the State of Louisiana, and principally in the Baton Rouge area, and none of the loans which they have made have been sold or transferred to out-of-state loan institutions for the period pertinent and material to this suit. The associations have not participated with out-of-state lenders in connection with any loans which they have made. (Stipulation No. 14; 385 F. Supp. at 842). All of the transactions which the petitioners contend that they were not permitted to handle as attorneys related to property situated in the Parish of East Baton Rouge or immediately adjacent parishes. (Stipulation No. 15; 385 F. Supp. at 842).

The real estate business in Louisiana is unique from the other areas of the United States in that it is based on the civil law concept of property, registry of title, sale, etc., as derived from Roman, Spanish and French law and as codified in the Louisiana Civil Code. As reflected in the stipulation, the real estate business in the Baton Rouge area is further atypical in that traditionally no bonded title guaranty company maintains offices in Baton Rouge or the surrounding areas and no real estate transactions are handled by such organizations. In addition, while there are commercial abstract companies

doing business in Baton Rouge and the surrounding parishes, their services are limited to the preparation of abstracts to be furnished to attorneys who are handling the real estate transactions. Attorneys either prepare their own abstracts from the public records of the office of the Clerk and Recorder of Mortgages for the Parish, or obtain abstracts from such commercial abstract companies whose services are available, and examine titles and certify title to the immovable property.[2] In the usual real estate transaction the purchaser and lender rely upon an attorney's certification of title, and title insurance, though available, is not customarily required or obtained. This custom is followed by all the defendant associations except Guaranty, which now requires title insurance. (Stipulation No. 18; 385 F. Supp. at 842-3).

As a condition to the lending of its funds, each association requires that attorneys of its choice certify to it that the borrower has a good and merchantable title, free of liens and encumbrances to the immovable property to be given as security for a loan. Each association further requires that security documents executed by the borrower to give the lender a first mortgage on the borrower's property be prepared, executed and recorded by the atorneys who are annually selected by its Board of Directors. Each borrower is required, as a part of the cost to him for the loan, to pay the association an amount equal to its costs, including its costs for the services of its attorneys for a title opinion and preparation, execution and recordation of the security documents. These charges

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[2] For a summary of the steps involved and some of the complexities occasioned by Louisiana law in the preparation of an abstract, see Downing and Rubin, "Preparation of An Abstract," Suppl. to Vol. 10, West's Louisiana Civil Code.

are in turn paid by the association to the attorneys.[3] The associations do not accept an attorney selected by the borrower to certify to the association the borrower's title to immovable property given as security for the loan of the funds of the association, or to draft, execute, or record the security documents. (Stipulation No. 7; 385 F. Supp. at 841). However, the borrower may employ an attorney of his choice, at his cost, and obtain from him a title examination, and have his attorney present at the execution of the mortgage, but the associations do not require the borrower to do so. The applicant for a loan has the privilege of either accepting or rejecting the loan if he does not choose to accept any of the conditions under which it will be made. (Stipulation No. 8; 385 F. Supp. at 841).

The title examination and mortgage drafting services rendered to each association by its attorneys are for the benefit and sole interest of the association; the only thing the borrower realizes from such services is the receipt of the loan from the association. (Stipulation No. 10; 385 F. Supp. at 841).

Each association's attorneys are paid separately for legal services other than the title examinations and mortgage drafting services rendered to the association, either in the form of a retainer or through a separate billing, or both. (Stipulation No. 11; 385 F. Supp. at 842).

Federal regulations, which govern the actions of all of the associations, and state law, which governs the actions of

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[3] In the case of the Citizens Savings & Loan Association the borrower may at his option pay the charges for title examination and preparation of security documents directly to Citizens' attorneys.

the state chartered associations, expressly require that title certification to the associations be by the associations' attorneys. (Stipulation 16; 385 F. Supp. at 842).

IV. LAW AND ARGUMENT

A. This is not a Case in which a Review on Writ of Certiorari is Appropriate or Warranted

The petitioning lawyers challenge the right of each respondent savings and loan association to select attorneys of its own choice to examine titles to immovable property for it, render title opinions to it, and prepare the necessary security agreements, when lending its money. The activities complained of are entirely matters of a purely local nature. It is difficult to conceive of activity more totally "local" in nature than examining titles to local property, at the local courthouse, to allow loans to be made on the security of such property for local homes. As discussed above, these activities are influenced by and subject to unique aspects of Louisiana law. Thus, none of the reasons for a review on writ of certiorari as provided by Rule 19 of the Rules of The United States Supreme Court are present in this case. There is no conflict between the Courts of Appeals on the question presented. There is no important state or territorial question involved. There is no important federal law question presented. In summary, there are no special or important reasons calling for this Court to exercise its power of supervision. The petition for writ of certiorari should therefore be denied.

B. The Associations Have a Funudamental Right to Counsel of Their Choice

When plaintiffs' complaint is stripped of the irrelevant

side issues, its premise is simply that the associations should not be allowed to choose their own attorneys to prepare necessary security documents, examine titles to immovable property, and certify said titles to the associations. Plaintiffs contend that they should be selected as the attorney for the association whenever the borrower so requests.

It is clear that the legal services which plaintiffs here seek to provide are rendered **to the lender** and are for the purpose of obtaining **for the lender** the valid first mortgage and lien dictated by sound business practice and required by both state and federal laws. The borrower is not precluded from selecting his own attorney to render legal services to him in connection with the loan, but where the association is lending its members' money it must have assurance that the value of the property is adequate to secure the loan and that it has obtained a valid first mortgage upon the property. The association, therefore, utilizes appraisers and attorneys who have demonstrated competence in the performance of these services, and who are engaged to represent and protect the interests of the association.

A competent title examination and a properly prepared and recorded first mortgage is as much a part of the security for the loan as is an accurate valuation of the property. These associations simply assert the right to choose lawyers in whom they have confidence to perform these important legal services for them and on their behalf.

Furthermore, state law and federal regulations require that validity of the associations' security be certified to it by its attorneys and authorize the associations to pass this cost on to the borrowers. The applicable laws and regulations

are set forth in full in the Appendix to the Petition for Writ of Certiorari.

The Trial Court agreed with the associations' contention and correctly stated:

> "It is a well established principle that a party is entitled to have counsel of his choice. The fact that a homestead is allowed to select its own counsel but is permitted to pass the cost on to the buyer is confirmed in both federal and state law. The homestead is not refusing or excluding anyone from the legal and notarial business. It is simply exercising a fundamental right to select its own counsel." 385 F. Supp. at 839.

The Fifth Circuit Court of Appeals also agreed in its *per curiam* opinion with "the defendant associations that their procedures are in accordance with the basic and fundamental right of all persons to use counsel of their own choice and within the requirements of state and federal laws." 504 F.2d at 891.

For this reason, the associations cannot be violating any anti-trust law. This being the only true issue in this lawsuit, and there being no genuine issue of material fact with respect thereto, the petition for writ of certiorari should be denied.

C. No Antitrust Violation Present or Possible in the Instant Case

There is no necessity to consume this Court's time in answering long, sometimes inconsistent arguments found in petitioners' brief that respondents are somehow violating Sections 1 and 2 of the Sherman Act. The facts comprising the respondents' activities that are being challenged have been

stipulated to by the parties and clearly show no anti-trust violation is present or possible.

Petitioners have argued most strenuously that a tying arrangement exists under the facts as stipulated. However, in view of the facts that no two separate and distinct products exist under the stipulation, that the legal services challenged are an ancillary and necessary part of the business of producing the loans made by the associations, and that the associations are not engaged in the legal profession and derive no financial benefit from the legal services provided to them by their respective attorneys, it is clear that no tying arrangement exists in the case at bar.

Petitioners have stipulated that the services rendered by the attorneys of the association "are for the benefit and sole interest of the association; the only thing the borrower realizes from such services is the receipt of the loan from the association." (Stipulation 10; 385 F. Supp. at 841.) These services are not separate and distinct products, but are component parts of the loan, required by the prudent administration rule as well as state law and federal regulation to make loans by the associations available to borrowers. (See Stipulation 16; 385 F. Supp. at 842.)

It should be clear to this Court that this is not a case where a vendor seeks to circumvent the anti-trust laws simply by claiming that it is selling a "single product." Here, the associations are not in the legal business and do not "sell" legal services. Legal services are provided to them by their respective attorneys, said services being only one of many ingredients making the associations' single product—loans—available to their respective borrowers. See *U.S. v. Jerrold Electronics Corporation*, 187 F. Supp. 545 (E.D. Pa. 1960).

In the instant case, the associations receive no rebate, discount, commission, or any other financial or economic gain from the fact that one attorney is selected over another. (See Stipulation No. 7; 385 F. Supp. at 841.) Clearly, this distinguishes the instant case from the tying arrangement cases cited by petitioners. Therefore, there can be no prohibited tie-in in the instant case. The Fifth Circuit Court of Appeals agreed with the respondents' and "with the district court's determination that this method of doing business does not constitute a sale of two products or a violation of the tied product prohibition of the antitrust laws." 504 F.2d at 891.

V. CONCLUSION

For the reasons discussed above, the associations respectfully submit that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE

We hereby certify that 3 copies of the above and foregoing Brief have been deposited in a United States post office, first class postage prepaid, addressed as follows:

Bobby L. Forrest and Gerard E. Kiefer, d/b/a Forrest and Kiefer, A Legal Partnership, P. O. Box 66036, C.C.S. Baton Rouge, Louisiana.

Baton Rouge, Louisiana, this _____ day of _____, 1975.

SANDERS, MILLER, DOWNING & KEAN

By: _____
R. Gordon Kean

LAYCOCK, STEWART & PREIS

By: _____
Ashton L. Stewart

KANTROW, SPAHT, WEAVER & WALTER

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